No. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

ELIJAH DWAYNE JOUBERT,

Petitioner,

v.

ERIC GUERRERO, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether, under 28 U.S.C. § 2254(d)(1), a standard that places the burden on the petitioner to prove materiality from the State's knowing elicitation and failure to correct false testimony is "contrary to" clearly established federal law established by *Napue v. Illinois*, 360 U.S. 264 (1959) and its progeny, because it does not require the State to prove there was no reasonable probability the error affected the outcome of a petitioner's capital trial and sentencing.

PARTIES TO THE PROCEEDING

The Petitioner is Elijah Dwayne Joubert. The Respondent is Eric Guerrero, the Director of Texas Department of Criminal Justice, Correctional Institutions Division. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

351st Judicial District Court, Harris County, Texas:

State of Texas v. Elijah Dwayne Joubert, No. 944756 (Oct. 21, 2004) (judgment of conviction and sentence of death).

Court of Criminal Appeals of Texas:

Elijah Dwayne Joubert v. State of Texas, No. AP-75, 050 (Oct. 3, 2007) (direct appeal affirming the judgment of the trial court).

Ex parte Elijah Dwayne Joubert, No. WR-78, 119-01 (Sept. 25, 2013) (order denying relief on initial application for habeas corpus).

Ex parte Elijah Dwayne Joubert, No. WR-78,119-02 (Jun. 23, 2021) (order denying relief on subsequent application for a writ of habeas corpus).

United States District Court (S.D. Tex.):

Joubert v. Lumpkin, No. 13-cv-3002 (Sept. 24, 2024) (judgment dismissing second amended petition for habeas relief with prejudice).

United States Court of Appeals for the Fifth Circuit:

Joubert v. Guerrero, No. 24-70007 (Sept. 15, 2025) (order denying certificate of appealability).

Joubert v. Guerrero, No. 24-70007 (Oct. 29, 2025) (order denying petition for rehearing en banc).

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Elijah Dwayne Joubert respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court opinion denying federal habeas relief and a certificate of appealability is attached as Appendix C. The Fifth Circuit's opinions denying a certificate of appealability and denying en banc review are attached as Appendices A and B, respectively.

JURISDICTION

The order of the United States Court of Appeals denying rehearing en banc was entered on October 29, 2025. Pursuant to Supreme Court Rule 13.1 and Rule 30.1,[1] this petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(1) provides, in relevant part, that, "[u]nless a circuit court or judge issues a certificate of appealability, an appeal may not be taken to the court

[1] On January 27, 2026, the official homepage published the following notice: "The Supreme Court Building is closed. Pursuant to Supreme Court Rule 30.1, any filings otherwise due will be due on the next business day, Wednesday, January 28." Supreme Court of the United States, https://www.supremecourt.gov/ ("Today at the Court – Tuesday January 27, 2026"). *See* Rule 30.1 ("The last day of the period shall be included, unless it is a … day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed."

of appeals from—(A) the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court. …"

28 U.S.C. § 2253(c)(2) provides, in relevant part, that a "certificate of appealability under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

28 U.S.C. § 2254(d)(1) provides,

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States….

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. The offense

On April 3, 2003, Houston police officer Charles Clark and Alfredia Jones were killed during an armed robbery of a check-cashing store in Houston, Texas. Both Jones and Officer Clark died from single gunshot wounds to the head. ROA.8896. The next day, Houston Police Department (HPD) officers separately arrested Dashan Glaspie, Alfred Brown, and Petitioner Elijah Joubert in connection with the killings.

ROA.8722–23, 8729, 8828.[2] The three men knew each other from the Villa Americana (the "VA"), a low-income apartment complex in Houston. ROA.8229; 9015–16.

Glaspie was arrested first. He initially denied involvement, but once he had been given Brown's and Joubert's names, he attempted to implicate them. When Joubert was interviewed, he denied involvement. Then, detectives played him a portion of Glaspie's statement; expressing fear that he would be executed, Joubert admitted involvement but said that Glaspie had shot Jones, and Brown had shot Officer Clark. Indeed, Jones had been shot with Glaspie's gun.

Before Joubert's trial, Glaspie entered into a plea agreement crafted by the case's lead prosecutor, Assistant District Attorney Dan Rizzo. Glaspie pleaded guilty to a lesser charge of aggravated robbery, for which he would not be sentenced until after he testified against Joubert and Brown in their death-penalty trials. ROA.14930.

2. Based on Glaspie's testimony, the State argues that Joubert shot Jones.

Joubert was tried first. In the State's opening statement, Rizzo told the jury it would "hear that[,] after a lot of work[,] we believed [Glaspie] to be the non-shooter" in the robbery. ROA.8245. Rizzo said Glaspie would testify pursuant to a deal in which he would be sentenced to thirty years for aggravated robbery, but he would not face charges for murder. The key to Glaspie's deal was "that he has to testify truthfully." *Id.* Rizzo told the jury that if Glaspie "lies about anything … about one little

[2] The Petition cites to the electronic Record on Appeal (ROA) prepared by the Court of Appeals.

minor thing," or if his testimony "doesn't match the evidence and the truth in any way, the deal is that he can be prosecuted for capital murder." ROA.8246.

According to Rizzo, Glaspie would testify that when the robbers realized law enforcement had arrived, Joubert said, "'this bitch played us.'" ROA.8239. Rizzo said Glaspie would tell the jury that Joubert "raised up his hand, his arm, like a gangster, and shot [Jones] once in the head and that she dropped and died in the middle of the lobby." *Id*. Rizzo promised that "[a]ll of the evidence is going to be matching up for you." ROA.8241.

At trial, Glaspie testified that he recruited Joubert and Brown to participate in the robbery of a check-cashing store. ROA.9023–26. He said that it was Brown's idea to try the ACE store. ROA.9046–47. He said that, when the men arrived, he was the last of the three to go into the ACE store. ROA.9058. He said he allowed Joubert to carry his (Glaspie's) gun into the store and, when he entered, he saw Joubert holding the gun to Jones's head "behind the glass" booth where "people come up to do their business[,]" while Brown was holding the booth's door open. ROA.9059-61. Jones was kneeling at the store's safe. ROA.9062–63. Glaspie then checked the bathroom area for surveillance cameras, and when he returned, he saw a police officer in the lobby. ROA.9067–68. Glaspie said he saw Brown move into the lobby and heard "a few shots." ROA.9071–72.

According to Glaspie, Joubert grabbed Jones, moved into the lobby, told Glaspie "this bitch played us, man" and shot her. ROA.9072–74. Glaspie said he and Joubert exited the store and got in the car, where Brown was waiting in the driver's

seat. ROA.9075–76. Glaspie testified that Brown drove them back to the apartments. ROA.9077.

The State introduced Joubert's video-taped custodial statement, in which he repeatedly insisted that he did not have a gun at the check-cashing store and shot no one. ROA.14502–04; ROA.14534. Joubert said when the three men realized police had arrived, Glaspie grabbed Jones by the neck. Joubert told Glaspie, "[M]an don't do nothing to the woman[,]" but Glaspie shot her. ROA.14517–19. Joubert also identified Brown, after police told him that Glaspie had implicated him. ROA.14831.

In closing argument, Rizzo called the jury's attention to Glaspie's testimony about his plea deal, arguing it guaranteed that Glaspie testified truthfully. *See* ROA.9547 ("Glaspie told the truth when he testified. And he had good reason to."); ROA.9557. Rizzo said that "Glaspie was telling the truth" because his testimony "matches each and every small piece of evidence." ROA.9557. Rizzo told the jury that Joubert's recorded statement made him guilty of murder as a party—that is, a person held criminally responsible under Texas law for the acts of another. *See* Tex. Penal Code 7.02. But, he told the jury, "that's not the truth. That's not what happened. He is the killer, based on the evidence, of Mrs. Jones." ROA.8246–47.

The jury convicted Joubert and sentenced him to death; the Texas Court of Criminal Appeals (TCCA) affirmed. *Joubert v. State*, 235 S.W.3d 729 (Tex. Crim. App. 2007). This Court denied certiorari. *Joubert v. Texas*, 552 U.S. 1232 (2008). Joubert filed an application for state post-conviction relief. ROA.12744-84. The trial court entered findings of fact and conclusions of law and recommended that relief be denied.

ROA.13015. The TCCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Joubert*, No. WR-78,119-01, 2013 WL 5425127 (Tex. Crim. App. Sept. 25, 2013).

3. Brown is sentenced to death based on Glaspie's testimony and later exonerated after prosecutorial misconduct comes to light.

The State, led again by ADA Rizzo, tried Brown next. Glaspie's testimony against Brown was consistent with his testimony against Joubert. ROA.15047. But Brown's defense contradicted Glaspie by providing an alibi. Brown's girlfriend testified on cross-examination that he called her from her apartment around 10:00 a.m. on April 3, 2003—the same time as the robbery. ROA.15022. The jury found Brown guilty of capital murder in the death of Officer Clark and sentenced him to death.

Following Brown's trial, and after Joubert's federal habeas proceedings had already begun, new evidence emerged that called into question the prosecution's case against Brown and Joubert. In 2013, an HPD detective found cell phone records that supported Brown's girlfriend's testimony that Brown was not present during the murder. In the following years, the Harris County District Attorney conceded that Brown should receive a new trial in light of this new information, the TCCA granted Brown a new trial, and the prosecution dismissed charges against him rather than retry him.

But still more information indicting the prosecution's case came to light after the trial court's recommendation. In March 2018, the District Attorney announced the discovery of a previously undisclosed April 2003 email showing that lead prose-

cutor Dan Rizzo had been told by the HPD detective that the cell phone records supported Brown's alibi. ROA.14895; ROA.14936. As the DA's announcement explained, "The new evidence suggests … that well before Brown's trial, Rizzo was informed about the existence of the records, yet failed to disclose or provide them to the defense counsel or the jury." ROA.14895. The DA also announced that Rizzo's misconduct would be reported to the State Bar of Texas. ROA.14896.

Next, the DA appointed attorney John Raley to conduct an independent investigation of whether Brown was innocent. ROA.14897–98. In early 2019, the DA released Raley's report that describes McDaniel's email to Rizzo as "a plainly written statement from a police officer to a prosecutor opining that certain evidence is consistent with a suspect's alibi."[3] ROA.14949. The report excoriated Rizzo for numerous unethical and corrupt actions in prosecuting the murder, including the abuse and intimidation of witnesses. The report concluded that, not only was Brown actually innocent, "[t]he evidence indicates that the State's chief witness Dashan Glaspie"—not Elijah Joubert—"murdered Alfredia Jones in cold blood, then avoided a murder charge by providing law enforcement with a name for Officer Clark's killer." ROA.15011.

[3] The entire communication between Rizzo and McDaniel appears at ROA.14935–36.

4. The state trial court recommends that Joubert receive relief based on the evidence of the lead prosecutor's misconduct and Glaspie's false testimony.

When the initial information about the prosecutor's misconduct came to light, Joubert was already pursuing habeas relief in federal court. In 2015, Joubert was permitted to stay his federal habeas proceedings so he could exhaust claims related to the new evidence of misconduct in state court. ROA.1604–05. He raised claims that the State had presented false and misleading testimony through its key witness, Glaspie, and withheld material evidence from Joubert's defense team. ROA.13299. The TCCA remanded the case to the trial court for merits review. *See Ex parte Joubert*, No. WR-78,119-02, 2016 WL 5820502 (Tex. Crim. App. Oct. 5, 2016). The trial court recommended that relief be denied in 2017—that is, before the April 2003 email proving Rizzo's knowledge of evidence contradicting Glaspie's testimony and the Raley report was issued. ROA.14870. Instead of ruling on the incomplete record, the TCCA—at the State's request—remanded the case to the trial court again. ROA.15300–15304 (remand order).

On remand, the habeas judge considered the new information and recommended that relief be granted. ROA 14770–838 (trial court's findings and conclusions). In its proposed findings of fact to the state habeas court, the State conceded that Joubert "successfully demonstrate[d] that the State elicited false testimony from [Dashan] Glaspie, specifically regarding Brown's involvement in the capital murder[.]" ROA.14749. Earlier in the state-court proceedings, the State acknowledged

that Glaspie had provided the "most powerful evidence in the State's case" against Joubert. ROA.14821 (quoting State's brief).

The state habeas court found that ADA "Rizzo was aware that (a) the evidence linking Mr. Brown to the robbery and homicides was false, and (b) Mr. Glaspie's testimony about his plea deal requiring complete consistency with the evidence was false." ROA.14815; ROA.14817–18. The habeas court also found that Joubert's identification of Brown was false, ROA.14813, and that Rizzo made false statements during his opening and closing arguments. ROA.14814.

The trial court concluded that Glaspie's false testimony was material to the jury's verdicts in Joubert's conviction and sentence. ROA.14818–25; ROA. 14818 – 19 (placing burden on State to show error was not material).

Addressing the liability phase of trial, the state habeas court found "it is at least reasonably likely that the jury convicted [Joubert] as a principal—a theory built on Mr. Glaspie's testimony—just as the State argued they should." ROA.14821. "As to punishment," the state habeas court found that, "[i]f the jury disbelieved Mr. Joubert" and believed Glaspie, "as the prosecution argued they should, they also would have discredited [Joubert's] statements of remorse … and coercion by Mr. Glaspie." ROA.14822.

5. The TCCA and federal courts deny relief.

The TCCA said it "disagreed" with the trial court's conclusion regarding materiality and denied relief. App. 126. The TCCA stated that Joubert had the burden of proving that the State's sponsoring and failure to correct the false testimony were

material to the conviction and sentence. *Id*. The TCCA did not question or alter any of the trial court's factual findings. *Id*. Nor did the TCCA did weigh in its decision any false testimony except Glaspie's "about Brown's participation in the instant offense." *Id*.

Joubert returned to federal court and filed a second amended habeas petition. ROA.1990–2202. The district court denied all Joubert's claims and denied a certificate of appealability (COA). App. C at 27–124; ROA.2770–2867. Joubert sought a COA in the Fifth Circuit, which denied the request. App. A at 24. It concluded that the TCCA's judgment was not contrary to clearly established federal law, as required by 28 U.S.C. § 2254(d)(1) because, while the incorrect materiality standard recited by the state court diverged from the long-established constitutional standard, it was not "diametrically different" from clearly established law. App. A at 10. Nor did the state court's judgment involve an "unreasonable application of federal law." *Id.* at 11. Rather, the state court and the federal district court had properly focused on the materiality "of the false testimony." *Id.*

The court of appeals held that the state-sponsored false testimony could not be material because, in his statement to police, Joubert also put Alfred Brown at the scene. *See* App. A at 1, 12. As to guilt, the court held that reasonable jurists would not debate the district court's decision that the uncorrected false testimony was not material, because Joubert's confession was "probably the most damaging and probative evidence … admitted against him." *Id.* at 12 (citation modified). "To be material," the court stated, "Glaspie's false testimony about Brown must have caused the jury

to overlook Joubert's own confession." *Id.* at 13. As to punishment, the court found that "[a]ny potential effect the false testimony regarding Brown may have had with respect to the penalty phase is muted in light of the total mix of evidence heard by the jury regarding Brown's role and Joubert's guilt." *Id.* at 14.

In a motion for rehearing en banc, Joubert argued that the Fifth Circuit had failed to correctly apply this Court's precedent in *Glossip v. Oklahoma* in rejecting his Glaspie-related claims brought under *Napue v. Illinois,* 360 U.S. 264 (1959). The court denied the motion. App. B at 26.

REASONS FOR GRANTING THE PETITION

Last Term's decision in *Glossip v. Oklahoma*, 604 U.S. 226 (2025) was a landmark in constitutional criminal procedure not because it broke new legal ground, but because it reaffirmed the vitality of an old rule of constitutional law: the bedrock due-process right forbidding the State's knowing use and failure to correct false testimony, as established in *Napue v. Illinois*.

Napue required the criminal defendant to show the state knowingly solicited false testimony. Then to deter the exceptionally corrosive misconduct, *Napue* imposed an exceptionally "strict" materiality standard that placed no additional burden of proof on the petitioner. *United States v. Agurs*, 427 U.S. 97, 104 (1976) (explaining the purpose behind the "strict" rule). As *Glossip* recited the rule:

> If the defendant makes that showing, a new trial is warranted so long as the false testimony "may have had an effect on the outcome of the trial," *Napue*, 360 U.S. at 272—that is, if it " 'in any reasonable likelihood [could] have affected the judgment of the jury,' " *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271). In effect, this materiality standard requires " ' "the beneficiary of [the] con-

> stitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " *United States v. Bagley*, 473 U.S. 667, 680, n. 9 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Glossip, 604 U.S. at 246.

Contrary to *Glossip*, however, the district court and court of appeals in Joubert's capital case condoned the Texas Court of Criminal Appeals's application of a materiality standard that cannot be squared with *Napue*. Instead of placing the burden on Joubert to prove that the prosecutor's egregious misconduct in this case did not affect the verdict and sentence, as the TCCA had done, *Napue*'s requirement of materiality—as *Glossip* reminded us—required the "beneficiary" of the false testimony to bear the burden of proving the violation harmless. *Glossip*, 604 U.S. at 246.

This Court should grant certiorari to confirm the proper standard for assessing materiality when federal courts evaluate *Napue* claims adjudged on the merits by state courts under 28 U.S.C. § 2254(d)(1). Lower court rulings are indicative of uncertainty regarding the articulation of the materiality for false-testimony claims in *Napue*—in spite of this Court's established precedent and recent decision in *Glossip*.

Because a prosecutor's intentional deception used to secure a conviction through false testimony is so at odds with the ethical duties of prosecutors, *Banks v. Dretke*, 540 U.S. 668, 694 (2004), and represents such a "corruption of the truth-seeking function of the trial process," *Agurs*, 427 U.S. at 104, this Court should not let this confusion linger, especially when it taints a capital conviction and death sentence like Mr. Joubert's.

The Court should grant certiorari to decide whether clearly established federal law requires that the harmless error standard of *Chapman v. California*[4] applies when reviewing *Napue* claims.

In denying Joubert's *Napue* claim, the Texas Court of Criminal Appeals required Joubert to prove that ADA Rizzo's misconduct was not material to the verdict or sentencing in this case. App. 126. That requirement is contrary to the clearly established federal law announced in *Napue*. This Court has repeatedly held that a *Napue* violation requires reversal unless the "beneficiary" of misconduct proves there is no reasonable likelihood it had an effect on the outcome. *Glossip*, 604 U.S. at 246. Rather than allowing Joubert to receive full merits consideration of his claim or even an ordinary appeal of his capital habeas case, the federal district court and court of appeals believed that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) bar to relief for claims adjudicated in state courts, 28 U.S.C. 2254(d), required denial.

Federal habeas law surely limits relief where state courts have adjudicated claims, so long as their decision is not "contrary to" or an "unreasonable application of" clearly established federal law. Joubert argued below that the TCCA rule was "contrary to" *Napue* and its progeny. "A state court decision is contrary to … clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *see id.* at 414-15 (finding state-court decision contrary to *Strickland* where it applied prejudice test from *Lockhart v. Fretwell*, 506 U.S. 364 (1993)). Contradiction

[4] 386 U.S. 18 (1967).

occurs when a state court applies the wrong federal test[5] or deviates from the correct test.[6] As this Court recently recognized, "A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court." *Andrew v. White*, 604 U.S. 86, 95, (2025). Although federal courts applying the "contrary to" prong will not be permitted to nitpick state court decisions for semantic missteps, *see Klein v. Martin*, No. 25–51, 2026 WL 189976, at *4 (U.S. Jan. 26, 2026) (summary reversal), nor are they allowed to defer to a state court that chooses to apply the wrong constitutional rule.

A. The materiality standard contemplated by the *Napue* Court has been applied, unchanged, since the case was decided in 1959.

This Court held, in *Mooney v. Holohan*, that a prosecutor's knowing use of false testimony "is inconsistent with the rudimentary demands of justice." 294 U.S. 103, 112 (1935). In *Napue v. Illinois*, the Court addressed a case in which a prosecutor elicited false testimony that a witness testifying against the defendant had not received any promises of benefits in exchange for his testimony. 360 U.S. 264, 265, 271 (1959). Concluding that the conviction must be reversed, the Court applied a materiality standard that is, to this day, used to assess such claims—asking whether the false testimony could have, "in any reasonable likelihood" affected the judgment of the jury. *Id.* at 271.

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[5] *E.g.*, *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (holding application of standard for voluntariness of guilty plea was contrary to *Strickland*).

[6] *E.g.*, *Salts v. Epps*, 676 F.3d 468, 473, 477-78 (5th Cir. 2012) (requiring defendant to "show actual conflict" under circumstances contrary to Sixth Amendment law); *DiLosa v. Cain*, 279 F.3d 259, 264 (5th Cir. 2002) (applying sufficiency-of-evidence test was "contrary to *Kyles* [*v. Whitley*, 514 U.S. 419 (1995)]").

Napue's materiality standard has remained unchanged through decades of decisions developing the standards by which constitutional errors are reviewed. In 1967, this Court held that the same standard would be applied to all federal constitutional errors, requiring reversal when there was "a reasonable possibility" that constitutional error "might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 24 (1967). Such error, the Court held, "casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id.* After *Chapman* was decided, its standard and that articulated in *Napue* became interchangeable. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985); *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, (1972); *Clements v. Madden*, 112 F.4th 792, 807 (9th Cir. 2024); *United States v. Ausby*, 916 F.3d 1089, 1093–94 (D.C. Cir. 2019); *Tayborn v. Scott,* 251 F.3d 1125, 1131 (7th Cir. 2001); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995).

Two aspects of the *Napue* materiality standard are plain and important to Joubert's case. First, the standard is more favorable to defendants than the materiality standard governing prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963). Materiality under that case requires that defendants show a reasonable probability that, if the favorable evidence had been disclosed, the result would have been different. *Brady*, 373 U.S. at 87*; see Bagley*, 473 U.S. 667, 679–82 (1985) (*Napue* standard is more defendant-friendly than *Brady*'s). Second, defendants cannot be required to bear the burden of proving that a *Napue* violation was material.

The *Napue* standard remained constant, even as the Court decided precedent designed to better fit materiality and prejudice standards to a variety of claims and different proceedings. In 1993, the Court announced that *Chapman*'s harmless error standard would no longer apply to due process claims on collateral review. Rather, those litigants must prove actual prejudice, which means proving that the violation "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993).[7] The more strenuous standard, the Court held, served interests of finality and federalism. *Brecht*, 507 U.S. at 635.

This Court has never applied *Brecht*'s standard to *Napue* claims. Indeed, while *Brecht* is widely applied, the Court has carved out exceptions. In *Kyles v. Whitley,* for example, this Court made clear that *Brecht*'s additional actual-prejudice inquiry did not apply to exclusion-of-evidence claims under *Brady v. Maryland*, 373 U.S. 83 (1963). *Kyles v. Whitely*, 514 U.S. 419, 436 (1995). But, because the Court had decided not to review Kyles's *Napue* claim, it explicitly did not decide whether *Brecht* applied to sponsored-perjury claims. *Id.* at n.7. Indeed, this Court has never retreated from the materiality standard it established for *Napue* in 1959. Moreover, the standard—and in particular, its allocation of the burden to the state—has been recognized by both state and federal courts. *See, e.g., Rega v. Sec'y, Pa. Dep't of Corr.*, 115 F.4th 235,

[7] Of course, the *Brecht* analysis is not directly relevant to the evaluation of the state court adjudication under 2254(d). As this Court said in *Brown v. Davenport*, "[w]hen a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant relief without first applying both the test this Court outlined in *Brecht* and the one Congress prescribed in AEDPA." 596 U.S. 118, 122 (2022). Joubert cites *Brecht* to emphasize the sometimes circuitous path of materiality and prejudice jurisprudence.

244 (3d Cir. 2024) (equating *Napue* standard to that of *Chapman*); *Davis v. State*, 304 So.3d 281, 284 (Fla. 2020) (for *Napue* claims, state bears burden to show harmlessness beyond reasonable doubt).

B. This Court's decision in *Glossip* reaffirms the *Napue* materiality standard.

In *Glossip*, this Court affirmed that the standard for establishing a due process violation under *Napue* has not changed. *Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025) (quoted above) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The Court also reaffirmed two consequences of the *Napue* standard that are especially relevant to this case. First, it reaffirmed that evidence can be material if it undermines a witness's credibility. *Id.* at 248. Second, and relatedly, it cautioned that the false testimony need not itself have directly affected the trial's outcome to be material. *Id.* at 253. It quoted from *Napue*: "[a] lie is a lie, no matter what its subject.'" *Id.* at 253 (quoting *Napue*, 360 U.S. at 269–70).

The TCCA's decision rejecting the recommendation for relief in this case was contrary to this clearly established law, restated forcefully in *Glossip*. That court required Joubert to prove both that the prosecutor presented false testimony and that "the false testimony was material to the jury's verdict." App. D at 126. Thus, although the court provided no support for its finding that it was "not reasonably likely that

Glaspie's false testimony about Brown's participation in the offense affected the judgment of the jury," one thing is clear: it placed the burden to prove otherwise on Joubert. App. D. at 126.[8]

Rather than recognizing the state court's misapplication of the burden, the federal courts replicated it. The district court rejected Joubert's *Napue* claim under 28 U.S.C. § 2254(d)(1) because it found that he had "not shown that any false testimony about Brown's role in the crime influenced the jury's consideration." App. A at 12 (quoting the district court's opinion). That is not what *Napue*, as explained by this Court in *Glossip,* requires or allows. Neither the panel's opinion nor the district court's decision contains any analysis of whether the State met the burden *Napue* imposes on it. In fact, both opinions analyze Joubert's false-testimony claim on the presumption that the burden remained on Joubert. Thus, the court of appeals stated repeatedly that the jury "*could* [have] convict[ed] Joubert" based on other evidence, App. A at 16 (emphasis added), but did not once consider, as the Court requires, whether the State had proved beyond a reasonable doubt that the jury *would* convict based on that evidence.

[8] Constrained by its improper burden allocation, the TCCA made another error inconsistent with *Glossip*—it focused on the content of the testimony—"the testimony about Brown's participation in the offense"—rather than on the actual error of uncorrected, sponsored perjury. App. D at 126.

C. The court should grant certiorari, because the courts remain unsure and divided regarding the proper burden allocation for assessing materiality under *Napue*.

Despite this Court's clearly established and undisturbed precedent regarding *Napue's* materiality standard, many Courts have not correctly apportioned the burden of proof. *See, e.g., Uvukansi v. Guerrero*, 126 F.4th 382, 390 (5th Cir. 2025) ("No majority of the Supreme Court has indicated that *Napue*'s materiality standard is the same as *Chapman*'s harmless error standard."), *cited in* App. A at 10; *see also United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015) (defendant failed to show any reasonable probability of effect on verdict); *United States v. Collins*, 799 F.3d 554 (6th Cir. 2015) (defendant must establish materiality).

Further, following *Brecht* and *Kyles*, the courts have fractured on the question of *Napue* materiality. Soon after this Court decided *Kyles,* the circuits divided on the question whether *Brecht*'s more stringent materiality analysis applied to *Napue* claims. Most courts saw this Court's decision not to include *Napue* error in its *Kyles* holding as an indication that the onerous *Brecht* standard does apply to sponsored-perjury claims. *See, e.g., Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995); *see also Rosencrantz v. Lafler*, 568 F.3d 577, 589–90 (6th Cir. 2009); *United States v. Clay*, 720 F.3d 1021, 1026 & n.4 (8th Cir. 2013); *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1112–14 (11th Cir. 2012). The First Circuit's decision in *Gilday*—the first case to address the issue—explained the reasoning behind this approach, pointing to the difference between the failure-to-disclose and perjury standards. To satisfy the former, the court observed, a petitioner must prove there was "a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Gilday*, 59 F.3d at 267 (quoting *Kyles*, 514 U.S. at 435). The *Kyles* Court had held that the *Brecht* standard effectively merges with this standard, so a *Brecht* inquiry is not warranted in failure-to-disclose *Brady* claims. *Id.* at 267–68. The materiality standard for *Napue* error, on the other hand, is less onerous, requiring only "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Id.* (citing *Kyles*, 514 U.S. at 435) (emphasis added by *Gilday* court). This standard cannot merge with the *Brecht* standard, the First Circuit held, because it is less onerous. *Id.* at 267-68. Accordingly, the court held, once materiality is established, *Napue* claimants must prove the error was harmful under *Brecht*. *Id.* at 269.

By contrast, two circuits, the Ninth and the Third, have held that *Kyles*'s reasoning requires rejecting *Brecht's* actual-prejudice requirement. *See Haskell v. Sup't Green SCI,* 866 F.3d 139, 150–51 (3d Cir. 2017); *Hayes v. Brown*, 399 F.3d 972, 984–86 (9th Cir. 2005). This approach is best explained by the Ninth Circuit in *Hayes*. There, the court noted that when this Court has "declared a materiality standard, as it has for [*Napue*] error, there is no need to conduct a separate harmless error analysis." *Hayes*, 399 F.3d at 984. Rather, a finding that the *Bagley* materiality analysis has been satisfied "necessarily compels the conclusion that the error was not harmless." *Id.* (citing *Kyles*, 514 U.S. at 435); *see also Haskell*, 399 F.3d at 150-51 (same).

Further, applying the *Brecht* harmlessness analysis to a *Napue* claim does not guarantee proper allocation of the materiality burden. For example, the Eleventh

Circuit retains the requirement that the State bears the burden regarding materiality, but it then imposes the burden on petitioners to prove harm under *Brecht*. *Trepal,* 684 F.3d at 1113–14. As the Eleventh Circuit has recognized, this analysis permits it to forego a *Napue* inquiry entirely. *Id.* By contrast, the Ninth Circuit retains the *Chapman* materiality standard, but it imposes the burden to prove materiality on the petitioner. *Hayes*, at 399 F.3d at 984.

The extent of the confusion among the courts proves that proper allocation of the burden in *Napue* claims needs clarification. *See Uvukansi*, 126 F.4th at 390 (stating Supreme Court has "left ambiguous" the question whether materiality is an element of materiality petitioner must prove); *see also Ventura v. Att'y Gen., Fla.*, 419 F.3d 1269, 1280–81 & n.4 (11th Cir. 2005) (stating Supreme Court has not decided whether the *Chapman* standard applies to *Napue* claims). While this Court has never suggested *Chapman*'s standard and burden allocation no longer apply to *Napue* claims, it has also not followed up on its suggestion in *Kyles* that it might someday address that question. Indeed, before its recent decision in *Glossip*, the Court had not considered the merits of a *Napue* claim since 1985. *See United States v. Bagley*, 473 U.S. 667 (1985).

D. As *Glossip* makes clear, requiring the State to prove harmlessness is consistent with this Court's *Napue* precedent.

Although they are in the minority, courts that place the burden on the State to prove state-sponsored perjury did not affect the outcome of a trial have the better argument. Well before *Napue* established the standard for reviewing such misconduct, the Court recognized that due process requires states to be honest brokers in

criminal proceedings. *Mooney*, 294 U.S. at 112. There is no due process, the Court instructed, if a state has "contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.*; *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) (protection against state-sponsored perjury is most "rudimentary" of access-to-evidence rights); *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982) (calling *Napue* violation "egregious misconduct"); *Miller v. Pate*, 386 U.S. 1, 7 (1967) ("there can be no retreat" from principle that "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"); *Napue*, 360 U.S. at 270 (impact of state-sponsored perjury prevented "a trial that in any real sense be termed fair").

The reason for this emphasis should be clear: citizens look to the state for assurances that criminal convictions and penalties are reliable. The state decides whom to prosecute, what evidence to present and what evidence to keep to itself, and which witnesses to call. The criminal justice system loses integrity and legitimacy if those decisions cannot be trusted. Moreover, it is fundamentally unfair to ask a defendant to defend himself in a courtroom in which the prosecutor is not honest. *See Haskell*, 866 F.3d at 152 ("Presenting false testimony cuts to the core of a defendant's right to due process."). Prosecutors' breaches of that trust should not be excused by applying an onerous materiality standard.

As the Court's decision in *Kyles* makes clear, *Brecht* is not the rule by default. Rather, its rule should be applied only after careful attention to the nature of the claim at issue.

This is so even if, as other courts have noted, the *Napue* materiality standard cannot merge with the standard set forth in *Brecht*. Indeed, as the Third Circuit has suggested, given the nature of the misconduct at issue, this fact "seems to be a feature, not a bug." *Haskell*, 866 F.3d at 151. "If suppression of evidence (and thereby the truth) is a serious constitutional error, its fabrication is a greater error still." *Id.* Thus, it makes sense that a *Napue* claim would have more chance of success on collateral review.

In *Brecht*, this Court recognized that there may be some cases in which the constitutional violation is especially egregious that habeas relief may not be warranted, "even if [the error] did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. Perjury engineered by a prosecutor, as happened in this case, is especially egregious. Indeed, allowing undisputed commissions of state-sponsored perjury to go uncorrected would be constitutionally intolerable, especially in capital murder cases. The *Brecht* actual-prejudice showing should not be required in such cases, even though the *Napue* materiality finding is more defendant-friendly than the *Brecht* standard, and the state should be required to prove harmlessness.

E. Analyzed properly, the State's misconduct in this case was material.

The court's misplacement of the materiality burden was dispositive in Joubert's case. Despite agreement on the facts and the State's concession that its lead

prosecutor lied and sponsored false testimony to secure Joubert's conviction and sentence, the TCCA denied relief precisely because it adopted a materiality standard at odds with *Napue*.

As an initial matter, shifting the burden to Joubert permitted the court to repeatedly emphasize the evidence the court deemed to be "sufficient" to convict Joubert and justify his death sentence. Further, it permitted the reviewing courts to ignore the State's own characterizations of its case. On appeal, the State told the TCCA that "[Joubert] correctly observes that the most powerful evidence in the State's case was Dashan Glaspie's testimony." ROA.12612. In his motion and brief for a COA, Joubert cited the record for the State's description of Glaspie's testimony as its "most powerful evidence." But the court of appeals ignored the State's own words and twice described Joubert's confession, contrary to the State's assessment of its own case, as "'probably the most probative and damaging evidence that can be admitted against him.'" App. A at 12, 15 (quoting *Parker v. Randolph*, 442 U.S. 62, 72 (1979)). Had the panel properly held the State to its burden, it could not have overridden the State's admission with its own speculation of what the State's most material evidence was. Instead, the State would have had to concede to the panel, and the panel would have had to address, that the State's "most powerful evidence" was not only false, but it was also corroborated by a matrix of more perjury and false identifications, all of which the lead prosecutor suborned well ahead of trial.

Its attention trained on Joubert's statement rather than Glaspie's false, uncorrected testimony, the court of appeals was able to recast the case, narrowing the question to whether Glaspie's lie about Brown materially affected Joubert in light of Joubert's statement. But, as Joubert argued, the materiality of Glaspie's perjury stems from the uncorrected—indeed, encouraged—impression that Glaspie (and, by extension, ADA Rizzo), was honest, that he told the truth when he said he put his prized .45-caliber revolver with a laser site in Joubert's hands and followed him into to the ACE store unarmed. While other evidence corroborated the State's argument that Joubert was at the ACE store, the only evidence that he shot Jones came from Glaspie. His *Napue* arguments rest on the significant likelihood that a juror would have been inclined to reject the State's invitation to convict him and sentence him to death knowing that the State's star witness was a perjurer and that the prosecutor's assurances about that witness were equally dishonest.[9]

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[9] The court of appeals also contradicted *Napue* and *Glossip* in its failure to accurately account for the prosecution's failure to meet its "constitutional obligation to correct false testimony." *Glossip*, 604 U.S. at 246. The panel did consider a "counterfactual scenario," in which "the prosecutor corrected Glaspie's false trial testimony," App. A at 13, but that is not the right counterfactual. This is not a case in which a prosecutor expected to call a truthful witness and was then faced with one who testified falsely; the prosecutor presented Glaspie as the State's star witness knowing fully that Glaspie would falsely accuse Brown of murdering a police officer. The right counterfactual in this case, therefore, is one in which the jury finds out not just that Glaspie had struck a plea deal with the intent of committing perjury but also that Rizzo colluded in that perjury. Moreover, the jury would face this revelation of extreme prosecutorial misconduct while it recalled Rizzo's emphatic guarantee in his opening statement that if Glaspie "lies about anything … about one little minor thing," if his testimony "doesn't match the evidence and the truth in any way, the deal is that he can be prosecuted for capital murder. … [H]e has a big hammer over his head to testify truthfully." ROA.8246. The jury would also have witnessed the collapse of the house of cards that Rizzo used to prop up Glaspie's perjury—i.e., *five*

The taint of the State's misconduct extends beyond Glaspie. Five state-sponsored witnesses falsely corroborated Glaspie's story about Brown. *See* ROA.14813–14 (state habeas court's list of evidence "the parties agree … was false"). This included HPD Detective McDaniel, the officer who told Rizzo nineteen days after the crime that phone records corroborated Brown's alibi. The state habeas court found that, "[r]elying on Mr. Glaspie's representation as to which calls had been made by Mr. Brown, Det. McDaniel told the jury that Brown's location could be determined by the location data of Mr. Glaspie's phone at the time of those calls. Thus, the cell phone 'pings' of Mr. Glaspie's phone were used to place Mr. Brown near and en route to the scene before and after the crime." ROA.14788 (citing McDaniel's testimony at ROA.9229–40).

The court of appeals stated that "materiality is analyzed in the context of all the information before the jury["] and minimized Glaspie's perjury as material only if "[v]iewed in a vacuum." Op. 15. But it was the court that ignored the totality of Joubert's trial. *Glossip* instructs that assessing "what [the jury] would have done with the new evidence["] is essential and that the final analysis of prejudice in a *Napue* case "requires a cumulative evaluation of all the evidence." *Glossip*, 604 U.S. at 250, 251 (citation modified). Looking at undisputed perjury "in a vacuum" gets *Glossip* entirely wrong.

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witnesses who had given suborned, false testimony. That devastating exposé, and not an anodyne alternative in which Rizzo "corrected" Glaspie, is the one a court must consider in a *Napue* materiality analysis.

F. This case is an ideal vehicle for the Court to address questions regarding the *Napue* material standard after *Glossip*.

Like Richard Glossip, Elijah Joubert is a death-sentenced prisoner whose trial was infected with prosecutorial misconduct. As in *Glossip*, that misconduct involved state-sponsored perjury by the actual shooter—the only witness who identified Joubert as the shooter—who had a patent interest in minimizing his role in the offense. *Glossip*, 604 U.S. at 228–29 (Justin Sneed was provided only direct evidence of guilt). And, as in *Glossip*, the prosecutorial misconduct extends beyond knowingly sponsoring and concealing false testimony; it involved a coverup of more than ten years, while Joubert and his co-defendant Brown sought relief from their unjust convictions in state and federal courts. It also involved coercing and threatening grand jury witnesses and eliciting false statements from other witnesses, including law enforcement officers, to support Glaspie's lies. ROA.15011 (Raley Report, discussing prosecutorial misconduct; *see Glossip,* 604 U.S. at 229 (evidence of additional prosecutorial misconduct "further undermines" confidence in verdict.).

The district court and the court of appeals attempted to reduce Joubert's materiality arguments to mere semantics—suggesting that it didn't matter whether the courts applied a standard that properly placed the burden on the State to show that there was no likelihood a reasonable result without the misconduct occurring or whether it placed the burden on Joubert to show that a different result would have occurred without the misconduct. App. A at 9–11. But the record refutes that attempt.

The state trial court reviewed Joubert's claim under the proper standard, requiring the State to show harmlessness, and it recommended that Joubert receive a new trial. ROA.14818–19. Without altering a single factual finding, the TCCA reached a different conclusion, applying an incorrect and onerous standard. The standard can make a difference—a fact highlighted by this Court's attention to reiterating the correct standard in *Glossip*. 604 U.S. at 247. This would not be the first time the Court has exercised its authority to correct the TCCA for rejecting recommendations of relief by actual fact-finding courts based on clearly incorrect understandings of constitutional principles.[10]

This case requires only a narrow ruling from the Court—that the TCCA's materiality rule is contrary to *Napue* under 28 U.S.C. § 2254(d)(1). Although narrow, that decision would be a watershed. Based on counsel's research, this Court has never reviewed a state court's adjudication of a false-testimony claim that was governed by 28 U.S.C. § 2254(d) in the thirty-plus years since AEDPA was enacted. That has left a regrettable gap in the law—especially since federal habeas review of state-court convictions, rather than direct review by this Court, is far-and-away the norm. *See*

[10] *See, e.g.*, *Escobar v. Texas*, 143 S. Ct. 557 (2023) (vacating and remanding false evidence claim in which Texas conceded error after the TCCA rejected the trial court's recommendation of relief); *Andrus v. Texas*, 590 U.S. 806, 824 (2020) (summarily vacating and remanding ineffectiveness-of-counsel claim for which the TCCA rejected the trial court's recommendation of relief, noting "significant" concern that the TCCA failed to properly consider the Court's precedent); *Moore v. Texas*, 586 U.S. 133 (2019) (reversing and remanding intellectual disability claim for which the TCCA denied trial court's recommendation of relief after the Court had already vacated and remanded said claim and instructed the TCCA to follow established medical criteria).

Lawrence v. Florida, 549 U.S. 327, 335 (2007) (quoting *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (opinion of Stevens, J., concurring in denial of stay of execution)). Courts have sought in vain for guidance on what aspects of *Napue* remained clearly established given the lack of a new Supreme Court opinion. *Uvukansi v. Guerrero*, 126 F.4th 382, 390 (5th Cir. 2025) (citing *Ventura v. Att'y Gen. of Fla.*, 419 F.3d 1269, 1279 n.4 (11th Cir. 2005)).

In spite of well-established law, many state and federal courts have plainly missed the clear import of *Napue*'s undiminished precedent. With *Glossip*, this Court has reentered the field to affirm that *Napue* still means what it always said. As the leading criminal procedure treatise notes, after *Glossip*, the state court rules (and federal court deference to those rules), which deviated from *Napue* on the false impression that it had been altered or brought low over the years, are not "justifiable" any longer. 6 King et al., *Criminal Procedure* § 24.3(d).[11]

[11] The fact that so many courts missed something so obvious for so long in no way diminishes Joubert's ability to satisfy (d)(1): whether a rule is "contrary to" *Napue* is a question of doctrinal logic, not a head-counting exercise. *But see Uvukansi*, 126 F.4th at 391 ("The practice of other circuits suggests the Supreme Court has not clearly placed the burden of proof on the State.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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